

REMARKS

Claim 1 has been amended to add the description of the aliphatic thermoplastic polyurethane from page 13, lines 15-20 and page 23, line 11 to page 28, line 15.

Claims 2, 6, and 9 have been amended to add the definite articles in referring to the components of the first layer already mentioned in claim 1.

With these amendments, claims 1-10 remain pending.

Rejection for Obviousness-Type Double Patenting

Claim 1 stands rejected for obviousness-type double patenting over claim 25 of Mitchell, US 5,952,065. Applicants respectfully traverse this rejection as applied to the amended claim.

Mitchell, claim 25 has a barrier material that may include “polyurethane based thermoplastics.” The meaning of terms in a claim must be determined in the context of the specification. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc). In the case of the Mitchell claim 25, the Mitchell specification describes such polyurethanes for its barrier material as “polyurethane engineering thermoplastics such as ISOPLAST, a trademark of Dow Chemical Co,” Col. 9, ll. 41-52. This material is contrasted to the flexible resilient elastomeric material of the outer layer, which the Mitchell patent describes as “thermoplastic urethanes” that are “based on polyesters, polyethers, polycaprolactone and polycarbonate macryoglycols.” Col. 9, ll. 10-11, 17-26 & 32-40.

The present claims include as aliphatic thermoplastic polyurethane combined with at least one copolymer of ethylene and vinyl alcohol just such polyurethanes formed with polyester and polyether diols as the Mitchell patent distinguished from its barrier material. Therefore, Mitchell claim 25, when its claim term for “polyurethane based thermoplastics” is read in view of the

specification as required, does not and cannot suggest the gas-filled cushioning device of claim 1.

Accordingly, Applicants respectfully request withdrawal of the rejection and reconsideration of claim 1.

Rejection Under 35 U.S.C. 102(e) over Mitchell

Claims 1-10 have been rejected as anticipated by Mitchell, US 5,952,065. Applicants respectfully traverse the rejection as applied to the amended claims and request that the claims be reconsidered.

As discussed above, the Mitchell patent describes a barrier layer (inner layer 30) that may include “one or more materials selected from the group consisting of co-polymers of ethylene and vinyl alcohol . . . and polyurethane engineering thermoplastics . . .” Col. 9, ll. 42-51. Such polyurethane engineering thermoplastics are distinguished from the flexible resilient elastomeric material of the outer layer, which the Mitchell patent describes as “thermoplastic urethanes” that are “based on polyesters, polyethers, polycaprolactone and polycarbonate macroglycols.” Col. 9, ll. 10-11, 17-26 & 32-40.

The Mitchell patent also spends a paragraph distinguishing the Moureaux patent, US 5,036,110 as describing a premixing of copolymer of ethylene and vinyl alcohol with “thermoplastic urethane” that is “different than unmixed layers of thermoplastic urethane and copolymer of ethylene and vinyl alcohol” of the Mitchell membranes. Col. 14, ll. 40-50.

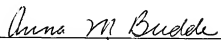
Thus, the Mitchell patent does not describe at least the claim feature of “a blend of at least one aliphatic thermoplastic polyurethane and at least one copolymer of ethylene and vinyl alcohol” and, necessarily as result, the further features of “the first layer includes up to about 50 wt. % of the at least one aliphatic thermoplastic polyurethane” and “the at least one aliphatic

thermoplastic polyurethane is formed as the reaction product of (a) at least one member selected from the group consisting of polyester and polyether diols, (b) at least one difunctional extender, and (c) at least one aliphatic diisocyanate.” Accordingly, Applicants respectfully request withdrawal of the rejection and reconsideration and allowance of the rejected claims.

Conclusion

It is believed that all of the stated grounds of rejection and objection have been properly traversed, accommodated, or rendered moot. Applicant therefore respectfully requests that the Examiner reconsider and withdraw all presently outstanding rejections and objections. It is believed that a full and complete response has been made to the outstanding Office Action, and as such, the present application is in condition for allowance. Thus, prompt and favorable consideration of this amendment is respectfully requested. The Examiner is invited to telephone the undersigned if it would be helpful for resolving any issue.

Respectfully submitted,



Anna M. Budde
Registration No. 35,085

January 19, 2009
Harness, Dickey & Pierce, P.L.C.
P.O. Box 828
Bloomfield Hills, Michigan 48303
(248) 641-1600